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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BRUCE PATRICK HANEY, Defendant and Appellant.	B167481 (Los Angeles County Super. Ct. No. PA042748)

APPEAL from a judgment of the Superior Court of Los Angeles County. Warren G. Greene, Judge. Affirmed and remanded with instructions.

Rita L. Swenor for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith Borjon, Supervising Deputy Attorney General and Scott A. Taryle, Deputy Attorney General, for Plaintiff and Respondent.

After a jury trial, appellant and defendant Bruce Patrick Haney was convicted of sale of cocaine base (Health & Saf. Code,[1] § 11352, subd. (a)) (count one) and possession for sale of cocaine base (§ 11351.5) (count two). Defendant admitted to: a 1985 conviction for burglary (Pen. Code, § 459) that constituted a "serious or violent felony or a strike" (Pen. Code, § 667.5, subd. (a)); a 1988 conviction for transportation for sale of narcotics (§ 11352); and a 1993 conviction for possession or manufacture of a dangerous weapon (Pen. Code, § 12020, subd. (a)). Defendant was sentenced to 11 years in prison: the middle term of four years for count one, doubled to eight years under the Three Strikes Law (Pen. Code, §§ 667, subd. (b)-(i), 1170.12, subds. (a)-(d)), plus a three-year enhancement under section 11370.2, subdivision (a). The court imposed "no sentence" on count two pursuant to Penal Code section 654. On appeal, defendant contends the trial court erred by failing to make an in camera inquiry regarding the name and reliability of the confidential informant in connection with defendant's suppression motion. Defendant also contends the trial court abused its discretion by declining to dismiss defendant's prior strike conviction. We affirm and remand with instructions.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Timothy Grabe and Luz Bednarchik are police officers in the Narcotics Division of the Los Angeles Police Department. In August 2002, Grabe obtained defendant's description, cellular telephone number and motel address from an arrestee who wished to remain anonymous. The arrestee told Grabe that defendant sold rock cocaine using that cell phone number. Grabe recorded the information on a field interview form. Because Grabe was not experienced in undercover operations, he did not investigate the matter further. Instead, the information was collected along with other narcotics leads.

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

In November 2002, Grabe gave defendant's information to Bednarchik, a seasoned undercover narcotics officer. That same day, Bednarchik called defendant and left a message that she was trying to reach "Bruce" and "needed to get something," street vernacular for narcotics. The following day, defendant returned her call and the two spoke. Busy at the time with other investigations, Bednarchik told defendant she would call him later when she had the money. Over the next few days, Bednarchik stayed in contact with defendant and advised him she wanted "a 40," street vernacular for $40 worth of narcotics. Defendant informed Bednarchik he would have the narcotics available within 20 minutes of her call.

A few days later, Bednarchik arranged with defendant for the narcotics transaction. A team of nine officers participated in the operation. Wearing plain clothes and a transmitting device, Bednarchik called defendant from a pay phone at a designated street corner. Twenty minutes later, defendant arrived. The two made eye contact and waved. When defendant approached, Bednarchik asked if he "had it." Defendant nodded and displayed two rocks of cocaine in his hand. Bednarchik paid for the rock cocaine with two $20 bills of prerecorded buy money. After the transaction, defendant walked away and Bednarchik notified the undercover team. Officers in a patrol car immediately approached defendant. He fled, threw down the money, fell and was apprehended. The two marked bills were found lying on the street. Tests confirmed the rocks sold by defendant contained 0.83 gram of cocaine base. A cell phone found on defendant matched the number called by Bednarchik.

Unknown to the officers at the time, defendant had been arrested in October 2002 and his cell phone had been among his booked possessions. The first time Bednarchik called defendant, there was no answer because he was still in custody and the cell phone was in a booked property locker. The next day, after he was released, defendant returned Bednarchik's call and informed her he had been in jail. As a result, defendant denied that an arrestee had given the police his cell phone number in August 2002, asserting instead that the police had obtained the information when he was in custody between October

and November 2002. Pursuant to Penal Code section 1538.5, defendant moved to suppress the cell phone evidence, asserting it was seized without a warrant in violation of the Fourth Amendment. The court denied the motion finding that the cell phone number was obtained from an informant earlier, and not from any search or intrusion into defendant's personal property when he was arrested later.

The jury convicted defendant on both counts. (§§ 11351.5, 11352, subd. (a).) At sentencing, defendant moved to strike an 18-year-old prior strike conviction pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. The court declined to strike the prior strike conviction because defendant had multiple convictions, prison commitments and parole violations since that time. The court sentenced defendant to 11 years in prison: the middle term of four years for count one, doubled to eight years under the Three Strikes Law, plus a three-year enhancement under section 11370.2, subdivision (a). The court imposed "no sentence" on count two pursuant to Penal Code section 654.

This appeal followed.

DISCUSSION

I. IN CAMERA HEARING OF CONFIDENTIAL INFORMANT'S IDENTITY

Defendant contends the trial court erred by failing to make an in camera inquiry regarding the name and reliability of the confidential informant in connection with the motion to suppress the cell phone evidence and the fruits thereof. We review this question under the abuse of discretion standard of review. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) We hold the trial court did not abuse its discretion by denying an in camera inquiry on the confidential informant.

A public entity has a privilege to refuse to disclose the identity of one who has furnished information concerning a violation of law if disclosure is against the public interest, i.e., the necessity for preserving confidentiality outweighs the necessity for disclosure in the interest of justice. (Evid. Code, § 1041, subd. (a).) A party to a criminal

proceeding may seek disclosure and a hearing on the ground the informant is a material witness on the issue of guilt. If the privilege of nondisclosure is claimed, the court may hold an in camera hearing out of the presence of the defendant and defense counsel to determine whether the informant's identity should be disclosed. "At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. . . . The court shall not order disclosure . . . if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing . . . the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (Evid. Code, § 1042, subd. (d).)

The rule requiring disclosure of an informant's identity has no application in situations where reasonable cause for arrest and search exists aside from the informant's communication. Thus, an informant's identity need not be disclosed where he was used only as a lead to information independently verified by a third party, making the identity of the informer immaterial in a test of the validity of a defendant's arrest, and where neither the arresting officer nor the prosecutor relied on the communication from the informer for probable cause for such arrest. (*People v. Williams* (1967) 255 Cal.App.2d 653, 661.)

Here, the informant was neither involved with the police's calls to defendant's cell phone nor with the narcotics investigation leading to defendant's arrest. Indeed, the record shows Grabe had no further contact with the informant subsequent to August 2002. The informant was thus not a percipient or material witness.

Defendant's claim that police illegally seized his cell phone number during his October 2002 incarceration is unsupported by evidence. Nothing in the prisoner's receipt shows an identification of defendant's cell phone number when the item was booked on his prior arrest. To the contrary, the evidence demonstrates the police were unaware that defendant was incarcerated when the investigation commenced. Grabe testified that he

did not know defendant was in custody when the first call was made to the cell phone number. Bednarchik was also ignorant of defendant's custody status, because she attempted to call defendant on his cell phone when it was held in a booked property locker. Only after defendant was released did the police learn he had been in custody when Bednarchik first called his cell phone.

Based on this evidence, the trial court's denial of the motion to suppress was well reasoned: "The officer has testified that the information leading to Mr. Haney's cell phone was obtained in August of 2002 and it was not acted upon until November of 2002. When the officer—undercover officer telephoned to that number, and when that number was received from an informant and not from any search or other intrusion into the personal property of Mr. Haney, I agree with [the prosecutor], there's no search and, as a result, if there's no search, there's no need for a warrant. . . . there is nothing to be suppressed. The motion to suppress under [section] 1538.5 of the Penal Code is denied."

We find defendant failed to make a prima facie case for an in camera hearing on the confidential informant's identity. The informant was not a percipient or material witness to the calls to defendant's cell phone or to the narcotics transaction. Thus, he or she was not a material witness as to guilt, nor was the information provided the basis for probable cause for the arrest. Accordingly, the trial court did not abuse its discretion in denying an in camera hearing. (Evid. Code, § 1042, subds. (c), (d).)

II. PRIOR STRIKE CONVICTION

Defendant contends the trial court abused its discretion by declining to dismiss defendant's prior strike conviction. The assertion lacks merit.

Prior to sentencing, defendant moved for dismissal of a 1985 burglary conviction. Defendant asserted that a doubling of his sentence by a prior strike would not help him or the community, his prior strike was remote, and his criminal record was of decreasing seriousness. Instead, defendant requested a lower sentence and drug treatment.

The trial court denied the motion due to defendant's lengthy criminal record, recidivism, and multiple parole violations. The court observed that defendant had "too many contacts, too many convictions, too many state prison commitments, too many violations of parole."

In *People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th 497, the Supreme Court held that when a defendant is sentenced under the "Three Strikes" Law, the sentencing court retains the discretion under subdivision (a) of Penal Code section 1385 to strike the prior convictions on its own motion in the interests of justice. (*Romero*, *supra*, at pp. 504, 529-530.) Inasmuch as a decision to strike or not to strike prior convictions lies within the discretion of the trial court, we cannot reverse that decision except for an abuse of discretion. (*Ibid*.)

The abuse of discretion standard is a deferential one. (*People v. Williams, supra,* 17 Cal.4th 148, 162.) The question is whether the trial court's action "'falls outside the bounds of reason' under the applicable law and the relevant facts." (*Ibid*.) That is, whether the trial court's action is one which would not have been taken by a reasonable judge (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 530-531) or the trial court has acted "in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice" (*People v. Jordan* (1986) 42 Cal.3d 308, 316).

Additionally, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

In deciding whether to dismiss prior convictions under section 1385, subdivision (a), the trial court must consider the defendant's background, the nature of his current offense and other individualized considerations (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at p. 531; *People v. Dent* (1995) 38 Cal.App.4th 1726, 1731), including all of the relevant factors, both aggravating and mitigating (*People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1274; see *People v. Jordan*, *supra*, 42 Cal.3d at p. 318). It must determine whether, in light of defendant's present and past offenses, "and the particulars of his background, character, and prospects, the defendant may be deemed outside the ['Three Strikes'] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.)

Defendant's probation report showed that between 1981 and 1982, he was convicted of three misdemeanors. In 1983, he had a second degree burglary conviction. In 1984, defendant was also convicted of two misdemeanors for being under the influence. In 1985, defendant suffered his strike conviction for first degree burglary and was sentenced to four years in prison. Subsequent to the strike conviction, defendant was convicted of selling narcotics and sentenced again to four years in prison in 1988. He violated parole on that matter and was returned to state prison. In 1993, defendant was further convicted of possessing a dangerous or deadly weapon and was sentenced to two years in prison. Then between 1995 and 1998, he was incarcerated on parole violation five times. He was later convicted of a misdemeanor for violation of a local ordinance, placed on one year's probation, and jailed for 10 days. In 2002, defendant was additionally arrested for assault with a deadly weapon and placed on probation once more. Even though defendant's 18-year-old prior strike conviction is remote, the court found the instant sale of the rock cocaine to be a serious offense.

The record confirms defendant is a habitual criminal who cannot stay away from crime. He has performed poorly on parole and probation, committed offenses repeatedly, and fails to acknowledge the seriousness of his criminal history or express any remorse

for his crimes. Under the circumstances, the trial court did not abuse its discretion in declining to strike defendant's prior convictions and sentence him as a second strike offender.

III. SENTENCING MINUTE ORDER AND ABSTRACT OF JUDGMENT

Penal Code section 654, subdivision (a), provides: "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Here, defendant was convicted of both sections 11352 and 11351.5 for the same conduct on the sale and possession of cocaine base. Sections 11352 and 11351.5 each provide for punishment of three, four or five years. The trial court sentenced defendant to the middle term of four years on count one, doubled to eight years under the Three Strikes Law, plus a three-year enhancement under section 11370.2, subdivision (a). However, the court imposed "no sentence" on count two pursuant to Penal Code section 654.

As defendant was convicted of both counts, the court should have imposed and then stayed the sentence on the second count. "When a defendant suffers multiple convictions, sentencing for some of which is precluded by operation of section 654, an acceptable procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable. Such stay is to be effective pending the successful service of sentence for the more serious conviction, at which time the stay is to become permanent. [Citations.]" (*People v. Miller* (1977) 18 Cal.3d 873, 886.) Accordingly, pursuant to Penal Code section 654, the trial court is directed to amend the sentencing minute order and abstract of judgment either to impose the middle term, doubled, in light of the proven strike, or to exercise its discretion pursuant to section 1385 to dismiss the prior strike allegation as to that count, and then to stay the sentence on count two.

DISPOSITION

Upon remand, the superior court shall cause its clerk to prepare an amended sentencing minute order and abstract of judgment consistent with this opinion. In all other respects, the judgment is affirmed.

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ZELON, J.

We concur:

JOHNSON, Acting P. J.

WOODS, J.